UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARGARET OROSZ 333 Mamaroneck Avenue White Plains, NY 10602, Plaintiff, vs. REGENERON PHARMACEUTICALS, INC. 777 Old Saw Mill River Road Tarrytown, NY 10591, Defendants.	CIVIL ACTION Civil Action No.: 7:15-cv-08504(NSR)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT IV OF SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendant Regeneron Pharmaceuticals, Inc. ("Regeneron") submits this memorandum of law in support of its motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Count IV of the Second Amended Complaint filed by plaintiff, Margaret Orosz ("Plaintiff"). Count IV, titled "Violations of Title VII, Pregnancy Discrimination - Failure to Hire", alleges that Regeneron failed to hire Plaintiff as a full time employee after learning of her pregnancy. In order for a failure to hire claim to succeed at this stage of the litigation Plaintiff has to allege that she applied for a specific position, was rejected, and Regeneron continued to seek other candidates for that position. As will be more fully demonstrated below, Plaintiff fails to articulate a legally cognizable failure to hire claim since she has not alleged – and cannot allege – that a position was available for which she applied and was rejected or that Regeneron continued to seek candidates for that position. Although Plaintiff and a Regeneron employee discussed the possibility of a specific position being created, Regeneron never created that specific position, Plaintiff did not apply to any Regeneron position, and Regeneron did not continue to seek applicants for this non-existent position. This dearth of proof, even at the pleading stage, has been found by the courts as fatal to failure to hire claims. If Plaintiff is permitted to proceed on this claim without fulfilling these prerequisites, any time a company employee speaks to a contractor about the possibility of that contractor being hired into a full-time position, that employer will be exposed to potential liability on a failure to hire claim if the employer ultimately does not decide to create the specific position that was discussed and make an employment offer to the contractor. It is hard to envision how the Courts could assess a decision by a company not to create a specific job or evaluate a dialogue between a company employee and a non-employee contractor about the mere possibility of the contractor being hired.

Accordingly, as will be discussed more fully below, Count IV of the Second Amended Complaint should be dismissed.

PROCEDURAL HISTORY

Plaintiff filed her initial Complaint on October 28, 2015 [D.E. 1]. A First Amended Complaint, removing a procedurally barred state claim, was filed on November 3, 2015. [D.E. 3] Regeneron answered the First Amended Complaint on January 28, 2016. [D.E. 11] On May 20, 2016, Plaintiff filed a Second Amended Complaint, adding a new claim, failure to hire, as Count IV. [D.E. 18]

STATEMENT OF FACTS[1]

Plaintiff instituted the subject action alleging that Regeneron violated the Fair Labor Standards Act ("FLSA"), the New York Labor Law ("NYLL"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). *See* Second Amended Complaint at ¶1, attached as Ex. A to the Declaration of Christopher Farella ("Farella Decl."). The pertinent allegations to this motion are derived from the Title VII allegations contained in the Second Amended Complaint.

Regeneron is a leading science-based biopharmaceutical company with a strong policy of equal employment opportunity and diversity. Known for its scientific and operational excellence, Regeneron discovers, invents, develops, manufactures, and commercializes medicines for the treatment of serious medical conditions. Regeneron markets medicines for eye diseases, hypercholesterolemia, and a rare inflammatory condition and has product candidates in development in other areas of high unmet medical need, including oncology, rheumatoid arthritis, allergic asthma, and atopic dermatitis.

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[1] When deciding a motion to dismiss pursuant to Rule 12(b)(6), a court's review is limited to the factual allegations in the complaint; documents incorporated by reference into the complaint; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and relied on bringing the suit. *Brass v. Am Film Techs, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). Regeneron maintains that the documents referenced herein fall within these appropriate categories. Moreover, although courts must take the pleadings as true for purposes of this motion (and Regeneron has utilized this approach herein), Regeneron does not admit any presently contested fact as true beyond the limited purpose of making this motion.

From June 2013 until August 2014, Plaintiff was an employee consultant of Microsol Resources Corp. ("Microsol"), a staffing company specializing in the placement of professionals in the architecture, engineering, and construction markets. *See id.* at ¶12. Regeneron retained Plaintiff through Microsol to perform architectural services in its Facilities Space Planning Department. *See id.* at ¶¶ 13-14. In or around November 2013, Patricia Hamilton, Manager, Space Planning for Regeneron, informed Plaintiff that she would be hired as a permanent Regeneron employee. *See id.* at ¶42. In or around January 2014, Hamilton met with Plaintiff to discuss a transition to permanent employment with Regeneron, and even instructed Plaintiff to prepare a job description for the position. *Id.* at ¶45.

On or about April 14, 2014, Plaintiff and Hamilton drafted a job description for a Facilities Architect, Space Planning. *See* Farella Decl. at Ex. B. Around this same time, Hamilton contacted Keith Turvey, Regeneron's Procurement Manager, to inquire about the cost to buy out plaintiff's contract with Microsol. *See id.* at Ex. A, ¶46. Turvey reported back to Hamilton that the cost would be approximately $16,000. *See id.* at ¶47.

On June 6, 2014, Hamilton emailed Plaintiff to tell her that she would be speaking to Michelle Fritsche, Director of Facilities, who was the person with the authority to make hiring decisions. *See* Farella Decl. at Ex. C. On June 24, 2014, Plaintiff wrote in an email to Hamilton that she was seeking an "update on my transition from `external' to a full-time employment offer." *See* Farella Decl. at Ex. D. Hamilton responded shortly after receiving the email that she "ha[s] to sit with Michelle to see how she wants to proceede [sic]." *See id.*

On July 9, 2014, Plaintiff once again reached out to Hamilton for an update. In the email, Plaintiff noted that Hamilton was supposed to speak with Fritsche but "no progress has been made otherwise" to transition her to "full-time employment." Plaintiff also acknowledged that Hamilton "re-signed another contract with Microsol." *See id.* at Ex. C. In other words, Plaintiff remained a contractor.

On July 28, 2014, Plaintiff sent an email to Daria Palestina, Senior Director of Human Resources with Regeneron, setting forth some issues she was having with her co-workers (among other things, about the placement of fans and the positioning of blinds on the windows), and seeking an update on making her a full-time employee with Regeneron. *See* Farella Decl. at Ex. E. In that same email, Plaintiff announced that she was four months pregnant. *See id.*

On or about July 31, 2014, Fritsche informed Plaintiff that she would not be hired permanently. *See id.* at ¶52. Fritsche explained to Plaintiff that the reason was due to a lack of work and Plaintiff's lack of experience with Building Information Modeling ("BIM"). *See id.* at ¶54.

Plaintiff's Second Amended Complaint does not allege that a position titled "Facilities Architect" was actually created at Regeneron; in fact the correspondence shows the exact opposite. Plaintiff also fails to allege that she applied for that position for the simple reason that no such position existed at that time.

LEGAL ARGUMENT

COUNT IV OF THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED

A. Standard of Review

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint seeking relief "must contain in a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Whether a complaint alleges sufficient facts to state a claim on which relief can be granted is a question of law. *DeJesus v. Sears, Roebuck & Co.*, 87 F. 3d 65, 69 (2d Cir. 1996). To survive a motion to dismiss brought pursuant to Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 929 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

When considering a motion to dismiss pursuant to Rule 12(b)(6), this Court must accept all well-pleaded allegations in the complaint as true and construe the complaint in a light most favorable to plaintiff. *See DiFalco v. MSNBC Cable LLC*, 622 F.3d 104, 110-11 (2d Cir. 2010). However, courts should "giv[e] no effect to" assertions of law or to "legal conclusions couched as factual allegations." *Starr v. Sony BMG Music Entertainment*, 592 F. 3d 314, 321 (2d Cir. 2010), *cert. denied,* 131 S. Ct. 90 (2011).

B. Elements of a Claim of Failure to Hire

An essential element of a failure to hire claim is that a plaintiff allege that she applied for a specific position and was rejected. *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998). More specifically, plaintiff must allege that "(1) she is a member of a protected class; (2)

she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having plaintiff's qualifications." *Id.* at 709-10 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)).

A specific application is required to "ensure[ ] that, at the very least, the plaintiff employee alleges a particular adverse employment action, an instance of alleged discrimination, by the employer." *Id.* at 710. Further, the requirement ensures that the fact finder is not left to speculate as to the qualifications of the competing candidates or the damages to be derived from the salary of unknown jobs. *Id.* The requirement also protects employers from the unfair burden of having "to keep track of all employees who have generally expressed an interest in promotion and [to] consider each of them for any opening for which they are qualified but did not specifically apply." *Id.*

C. Plaintiff Cannot Meet Three of the Four Elements of a Failure to Hire Claim

Although Plaintiff satisfies the first element of a *prima facie* case, namely that she is a member of a protected class, her claim fails since she is unable to allege, much less demonstrate, that she satisfies any of the other three elements. Beginning with the second element, Plaintiff must demonstrate that she applied and was qualified for a position in which Regeneron was seeking applicants. Plaintiff does not, and cannot, make this allegation. Regeneron was not seeking applicants for any job with Plaintiff's qualifications. While there were discussions of a potential position between Plaintiff and Hamilton (who did not have the authority to create any position within the company), Plaintiff's correspondence with Hamilton (and lack of pleading otherwise) is a concession that such a position was never created. To the extent that the facts demonstrate a position was somehow created, Plaintiff concedes that Michelle Fritsche wanted someone with BIM experience, which means that Plaintiff (who did not possess this qualification) would still not satisfy this element. *See* Farella Decl. at Ex. A, ¶54.[2]

Similarly, Plaintiff also cannot satisfy the third or fourth elements, that Regeneron rejected her for the position and continued to seek applicants for that position. Simply put, since there was no position, formally or informally, Plaintiff could not have been rejected from it nor could it have remained open for Regeneron to seek additional applicants. Plaintiff, through mere *ipse dixit,* states that Regeneron sought applicants for that position after "rejecting" her, *see* Farella Decl. at Ex. A, ¶58. This is another example of a legal conclusion couched as a factual assertion that this Court should simply disregard. *See* footnote 2, below. Even if this Court considers this allegation, Plaintiff will not be able to offer a scintilla of proof on that point. The record is undisputed – the Facilities Architect position was not created and Regeneron did not seek any applicants for it.

The case law is clear that where there is no position and where no applicants are sought, no failure to promote claim exists. *See Holt v. KMI Continental*, 95 F. 3d 123, 129 (2d Cir. 1996) (absence of a position fatal to claim of failure to promote); *Bernstein v. The Mony Group, Inc.*, 228 F. Supp. 2d 415, 419 (S.D.N.Y. 2002) (same); *see also Brown*, *supra.* 163 F. 3d at 709 (same). The *Bernstein* case is strikingly similar to the facts herein. Plaintiff Bernstein asked her direct supervisor, Connors, to create an opportunity for her in the areas of marketing and recruiting. *Id.* Bernstein and Connors even worked together preparing and proposing a job description. *Id.* However, a position was never officially created and Bernstein never applied for it. *Id.* Accordingly, the court dismissed the claim. *Id.*

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[2] Plaintiff couches this requirement of BIM experience as "pretext." Like other portions of the Second Amended Complaint, this is a legal conclusion which should be disregarded. *See Starr*, 592 F. 3d at 321.

The same result should attend here with respect to Plaintiff's failure to hire claim. Plaintiff alleges in her Second Amended Complaint that Hamilton met with her to "discuss her transition to a permanent position" with Regeneron and "instructed plaintiff to draft a job description for her permanent position." *See* Farella Decl. at Ex. A, ¶45. Plaintiff fails to allege that the position was ever created or that she actually applied for it. In fact, her correspondence with Regeneron demonstrates the exact opposite – that Regeneron never took the step of actually creating the position. Much like the plaintiff in *Bernstein*, plaintiff here engaged in some preparation, but ultimately a position did not materialize and Regeneron did not seek any applicants for it, before or after Plaintiff was told her contract was completed.

Plaintiff also cannot rely upon her conversations with Hamilton as evidence that a position was created. Although her self-serving correspondence with Hamilton makes it appear as if only small details remained before she became a full-time employee, Plaintiff understood and concedes in her contemporaneous writings that Hamilton had to receive approval from Fritsche before proceeding.

Similarly, plaintiff cannot claim that she "applied" for any position by and through her conversations with Hamilton. Mere discussions about seeking a position or promotion do not convert into failure to hire claims where no position was actually created and no applicants were sought. *See Blake v. Bronx Lebanon Hospital Center*, 2203 U.S. Dist. LEXIS 75770 at *6, 21-23 (S.D.N.Y. Oct. 10, 2007) (holding that despite verbal requests the promotion, plaintiff ultimately failed to state a claim for failure to hire, where duties of a position were delegated to others and no applications sought).

Finally, it is also significant to note that the failure of Regeneron to take the necessary steps to make Plaintiff a full-time employee predated her July 28, 2014 email informing everyone of her pregnancy. Plaintiff's own correspondence, beginning in early June, is replete with complaints that the full-time hiring process was not moving forward. Thus, even Plaintiff cannot breach this overarching temporal hurdle in order to make a failure to hire claim.

CONCLUSION

Plaintiff cannot demonstrate the elements necessary to assert a claim for failure to hire under Title VII. Regeneron did not have or create a position for which she was qualified and it did not reject her or continue to seek applicants for such a non-existent position. For the foregoing reasons, pursuant to Rule 12(b)(6), Count IV of Plaintiff's Second Amended Complaint should be dismissed.

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By: ______________________
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Dated: June 9, 2016